The Role of International Law in Texas Jurisprudence[1]

I. Introduction: Nationalism vs. Transnationalism

The past two decades have witnessed the emergence of a new debate among legal scholars, namely, the propriety of citing international and foreign law in United States courts. The opposing viewpoints have been labeled "nationalist" and "transnationalist," arising largely from a series of cases in the U.S. Supreme Court that invoked international standards to aid in interpretations of the Constitution (accompanied by several denunciatory dissents from Justice Scalia). Generally speaking, nationalists advocate a complete disavowal of the use of international law as even persuasive authority in this country's courts, while transnationalists embrace international law as an unavoidable component of a global society. Nationalists fear that any citation to international law "undermines self-governance by giving incentives to interest groups, domestic and foreign to frame international and foreign law with a view toward influencing our domestic law."[2] Transnationalists counter that, like early cases from the U.S. Supreme Court,[3] an examination of other countries' approaches to novel issues, and the resulting consequences, provides practical insight into our own interpretation of similar issues.

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[2] John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 309 (2006).

[3] *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat."); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. 191, 198 (1815) ("The law of nations is the great source from which we derive those rules . . . which are recognized by all civilized and commercial states throughout Europe and America. . . . The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.").

In reality, like many politicized judicial disputes, the debate over the use of foreign and international law is more nuanced than it has been characterized. For example, both nationalists and transnationalists agree that foreign and international law may—indeed, must—be invoked when the law directs its application. The most prominent instances of this involve the interpretation of international treaties to which the U.S. is a signatory,[4] and the analysis of foreign law in order to determine the appropriate forum.[5] Thus, even so-called nationalists must from time to time interpret foreign and international law. On the other side, as well, many transnationalists concede that there are strict limitations on the invocation of foreign and international law. These include their use as persuasive, not binding authority, or their application only when determining whether a U.S. standard of morality is inconsistent with the world-view.

A majority at the U.S. Supreme Court has proven willing to cite international and foreign law in certain circumstances (most often in interpreting the Eighth Amendment prohibition against cruel and unusual punishment).[6] Notably, "no Supreme Court Justice that has included reference to foreign law in his or her opinion has indicated that the foreign authority cited was controlling in terms of the outcome of the case."[7]

State courts have been, overall, more reluctant to reference international or foreign law outside those situations where they are directed to do so. One is hard pressed, for example, to find

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[4] Even in the case of such treaties, the U.S. Supreme Court has held that Congress must enact implementing legislation in order for the treaty to have force in this country. *See Medellin v. Texas*, 552 U.S. 491, 504-505 (2008) ("[W]hile treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms." (quotations omitted)). For a list of UN human rights treaties signed by the United States, see http://wilpf.org/files/WILPF_US_HumanRightsTreaties.pdf.

[5] *See* Janella Ragwen, *The Propriety of Independently Referencing International Law*, 40 LOY. L.A. L. REV. 1407, 1411 (2007).

[6] *See Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010) ("Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question. A recent study concluded that only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the United States and Israel, ever impose the punishment in practice."); *Roper v. Simmons*, 543 U.S. 551, 604 (2005) (O'Connor, J., dissenting) ("Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. . . . [T]his Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries."); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing the European Court of Human Rights as being at odds with the Court's previous declaration that homosexual conduct had been criminalized throughout the history of Western civilization).

[7] Ronald A. Brand, *Judicial Review and United States Supreme Court Citations to Foreign and International Law*, 45 Duq. L. Rev. 423, 435 (2007).

a single Texas case that acknowledges, even in dicta, the persuasiveness of international law to the Court's decision. This is not necessarily the case in every state, however. In California, while not prevalent, reliance on international precedent is not as uncommon. In the 2008 California Supreme Court decision concerning homosexual marriage, *In re Marriage Cases*, the court noted that

> the California and federal Constitutions are not alone in recognizing that the right to marry is not properly viewed as simply a benefit or privilege that a government may establish or abolish as it sees fit, but rather that the right constitutes a *basic civil or human right of all people*. Article 16 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, provides: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. … [¶] … [¶] … The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Numerous other international human rights treaties similarly recognize the right "to marry and to found a family" as a basic human right (Internat. Covenant on Civil and Political Rights, Mar. 23, 1976, art. 23; see European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 9, 1953, art. 12; American Convention on Human Rights, July 18, 1978, art. 17), and the constitutions of many nations throughout the world explicitly link marriage and family and provide special protections to these institutions.[8]

For the most part, however, citations to foreign and international law in state court opinions are sparse. The following section surveys Texas cases that look to foreign and international law.

II. Foreign and International Law in Texas Courts

As recognized by former Chief Justice Thomas Phillips of the Texas Supreme Court, "both state courts and federal courts have, since the inception of the Republic, applied and developed international law."[9] As early as the years following the Civil War, the Texas Supreme Court examined the validity of land sales which were pending in county court when the Texas Constitution of 1869 took effect.[10] The Court held, as a rule of international law, that "the conquering power [may] displace the preexisting authority, and . . . assume, to such extent as it may deem proper, the exercise by itself of all the powers and functions of government."[11] The Court revisited this doctrine in a series of cases following the Mexican Revolution of 1910-1920, in which it relied on "well-

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[8] *In re Marriage Cases*, 183 P.3d 384, 426 n.41 (Cal. 2008).

[9] Thomas R. Phillips, *State Supreme Courts: Local Courts in a Global World*, 38 TEX. INT'L L.J. 557, 558 (2003).

[10] *Daniel v. Hutcheson*, 22 S.W. 933 (Tex. 1893).

[11] *Daniel*, 22 S.W. at 936; Phillips, 38 TEX. INT'L L.J. at 560.

settled principles of international law" to recognize certain foreign land sales.[12]

In more recent years, Texas courts tend to address foreign and international law in only three principal situations: (1) when interpreting an international treaty at issue; (2) when responding to death penalty appeals that invoke international human rights law (here, only to a limited extent); and (3) when deciding the choice of forum and the appropriate law to apply. Representative cases in each category demonstrate the way that the courts are directed to invoke foreign and international law.

i. Interpreting international treaties

The most common international treaty invoked in Texas courts is probably the Vienna Convention on Consular Relations. Article 36 of the Vienna Convention provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his righ[t]" to request assistance from the consul of his own state.[13] The United States ratified the Vienna Convention in 1969, along with the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention.[14] The Optional Protocol requires that disputes concerning the Convention "shall lie within the compulsory jurisdiction of the International Court of Justice" and "may accordingly be brought before the [ICJ] . . . by any party to the dispute being a Party to the present Protocol."[15]

The Texas Court of Criminal Appeals has analyzed the Vienna Convention on several occasions over the past decade. In *Rocha v. State*,[16] a 2000 case from that court, the defendant, a Mexican national, argued that the trial court erred in refusing to suppress his confession because law enforcement officers had failed to give him the requisite Vienna Convention warnings.[17] He contended that the exclusionary rule articulated in Texas Code of Criminal Procedure Article 38.23(a) applied to bar the admission of evidence obtained in contravention of Texas or United States law.[18] The court concluded that "Article 38.23 would seem ill-suited to address intersovereign

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[12] *Cia. Minera Ygnacio Rodriguez Ramos, S. A. v. Bartlesville Zinc Co*., 275 S.W. 388, 389 (Tex. 1925); Phillips, 38 TEX. INT'L L.J. at 561.

[13] Art. 36(1), 21 U.S.T., at 101; *Medellin*, 552 U.S. at 499.

[14] 21 U.S.T. 325, T. I. A. S. No. 6820; *Medellin*, 552 U.S. at 499.

[15] Art. I, 21 U.S.T., at 326; *Medellin*, 552 U.S. at 499.

[16] 16 S.W.3d 1 (Tex. Crim. App. 2000).

[17] 16 S.W.3d at 13.

[18] 16 S.W.3d at 13; TEX. CODE CRIM. PROC. art. 38.23 (a) ("No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence

disputes, and there is no reason to believe that the Texas Legislature ever anticipated that Article 38.23 would be used to enforce a treaty."[19] As to United States law, the court similarly declined to find that a Vienna Convention violation triggered the exclusionary rule as stated in Article 38.23. The court explained that

> [t]he effect of a treaty and the consequences of its violation are ultimately federal questions that only the United States Supreme Court can finally and definitively answer. We ordinarily think of state legislatures as free to confer upon individuals more expansive protection than that conferred by the federal government. But legislation conferring more remedies than a treaty actually confers could conceivably violate the Supremacy Clause if that legislation were found to be contrary to the language and the purpose of the treaty, because international treaties are exclusively federal matters. In the present case, it would seem likely—although not a foregone conclusion—that the Legislature could impose remedies for violations of the Vienna Convention that are in addition to remedies contemplated by the treaty itself without violating the Supremacy Clause. But, when faced with statutory ambiguity, we should not assume that the Legislature intended a certain remedy to extend to violations of an international treaty when it is not at all clear that the treaty contemplates such a remedy. At the very least, we have found reason to exclude the Vienna Convention treaty from Article 38.23's reach, even if one rejected the idea of holding the statute inapplicable to treaties in general. However, the Vienna Convention Treaty illustrates well the proposition that Article 38.23 is not a suitable enforcement mechanism for international treaties. Given the language of Article 38.23, the purpose and function that treaties provide, and the uniquely federal aspect involved in enforcing international agreements, we hold that treaties do not constitute "laws" for Article 38.23 purposes.[20]

This holding was affirmed seven years later, in *Sierra v. State*.[21]

In *Sorto v. State*,[22] the Criminal Court again examined the Vienna Convention to determine whether Texas authorities had complied with the "without delay" requirement of the consular notification provision. The court first noted that "[t]he issues of whether American state and federal courts are bound by the ICJ decisions . . . or whether Article 36 confers personal rights under the

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against the accused on the trial of any criminal case.").

[19] 16 S.W.3d at 16.

[20] 16 S.W.3d at 19 (citations omitted).

[21] 218 S.W.3d 85, 87 (Tex. Crim. App. 2007).

[22] 173 S.W.3d 469 (Tex. Crim. App. 2005).

federal constitution may be definitively resolved only by the United States Supreme Court."[23] The court further noted "that Article 94(2) of the United Nations Charter suggests that ICJ decisions are not privately enforceable in the courts of the member nations."[24] Nevertheless, the court evaded the question by concluding that "we need not resolve those issues in this case because, even assuming that American state and federal courts are bound by [ICJ decisions] or that Article 36 does confer personal rights, appellant has not shown: (1) that any of the rights he claims under the Vienna Convention were violated; or (2) that any purported treaty violation either caused him to do anything he would not otherwise have done or affected the fairness of his trial in any way."[25]

In *Ex parte Medellin*,[26] the Court of Criminal Appeals refused to grant a writ of habeas corpus to a capital defendant who was not advised of his consular rights, despite a series of latter ICJ cases, and a memorandum from President Bush stating that the United States would discharge its Vienna Convention obligations by having state courts give effect to ICJ decisions.[27] The court concluded that none of these factors constituted new developments for purposes of granting habeas review under the Texas Code of Criminal Procedure.[28]

The Texas Supreme Court has also had occasion—though infrequent—to interpret international treaties. In *Dubai Petroleum Company v. Kazi*,[29] the Court considered whether India and the U.S. share "equal treaty rights" for the purpose of adjudicating a wrongful death suit brought by the family of an Indian citizen who was killed while working on an oil rig in the United Arab Emirates.[30] Texas Civil Practices and Remedies Code section 71.031 provides that

> [a]n action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if . . . in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.[31]

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[23] 173 S.W.3d at 480.

[24] 173 S.W.3d at 481 n.40.

[25] 173 S.W.3d at 481.

[26] 280 S.W.3d 854 (Tex. Crim. App. 2008).

[27] 280 S.W.3d at 855.

[28] 280 S.W.3d at 856.

[29] *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex. 2000).

[30] 12 S.W.3d at 73.

[31] TEX. CIV. PRAC. & REM. CODE § 71.031(a)(4).

The court of appeals in that case held that the International Covenant on Civil and Political Rights[32] conferred "equal treaty rights" between India and the United States, and therefore satisfied the statute's jurisdictional requirement.[33] The Supreme Court affirmed, though for different reasons. The Court agreed that "the Covenant provides for equal access to courts and equal treatment in civil proceedings, [thereby] satisf[ying] the Kazis' initial burden of establishing 'equal treaty rights.'"[34] However, the Court also held that

> just because a country has signed a treaty that we would construe as granting United States citizens equal court access, that country does not have "equal treaty rights" with the United States if it has not construed the treaty to provide such access or its domestic law does not otherwise provide for equal access for United States citizens. Therefore, a defendant may rebut the presumption by producing evidence that, under the foreign country's law, United States citizens do not have equal access to courts.[35]

The Court remanded the case to the court of appeals to determine that issue.

More recently, Texas courts of appeals have had to rely on international law to adjudicate family law disputes. Specifically, the Hague Convention on Civil Aspects of International Child Abduction (HCCAICA), to which the U.S. is a signatory, acts to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence."[36] Congress subsequently passed the International Child Abduction Remedies Act (ICARA) in order to establish procedures for the implementation of the HCCAICA in the United States.[37] "A court hearing a Hague Convention petition under the HCCAICA has the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim. The premise of the Hague Convention is that the country in which the child has his habitual residence is in the best position to determine questions of parental custody and access."[38] "Once a petitioner establishes that a wrongful removal or retention has occurred, the child must be repatriated unless the respondent establishes that any of the Hague

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[32] International Covenant on Civil and Political Rights, *adopted by the U.N. General Assembly* Dec. 16, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368.

[33] 12 S.W.3d at 74.

[34] 12 S.W.3d at 83.

[35] 12 S.W.3d at 80.

[36] Hague Convention on Civil Aspects of International Child Abduction, pmbl., Oct. 25, 1980, T.I.A.S. No. 11670, 1434 U.N.T.S. 48.

[37] 42 U.S.C. § 11601(b)(1).

[38] *Livanos v. Livanos*, 333 S.W.3d 868, 876 (Tex. App.–Houston [1st Dist.] 2010, no pet.) (citations and quotations omitted).

Convention's affirmative defenses apply."[39]

A number of courts of appeals have analyzed the meaning of terms within the Hague Convention (such as, "habitual residence," or "rights of custody"),[40] the interplay between the Convention and the Texas Family Code,[41] whether Hague Convention petitioners have satisfied the Convention's notice requirements,[42] whether there are applicable affirmative defenses against removal of the child,[43] and how much deference must be accorded judgments rendered in foreign nations under the Convention,[44] among other issues.

In at least one case, the Texas Supreme Court cited international law as support for its holding, not as a requisite analytical tool. In *Virginia Indonesia Company v. Harris County Appraisal District*, the Court "consider[ed] whether goods purchased by the Virginia Indonesia Company (VICO) on behalf of an Indonesian joint venture are exempt from a state ad valorem tax."[45] Harris County argued that, because VICO's shipments had to stop in Harris County for required inspections, they were taxable.[46] The Court disagreed, holding that "[b]ecause we view the presence of VICO's goods in Harris County as a necessary stoppage incident to their transportation abroad, we conclude that, while at the export packer's facility in Harris County, VICO's goods remain in the stream of export and immune from state taxation."[47] The Court noted that VICO had no option but to allow the goods to be inspected en route, because, citing the General Agreement on Tariffs and Trade (GATT), "Indonesian law requires a pre-shipment inspection of the quality and quantity of the imported goods by an independent inspection agency selected by the Republic of Indonesia."[48] Notably, the Court was not required to cite to an international agreement, but did so nonetheless to provide support for its holding.

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[39] *In re J.J.L.-P.*, 256 S.W.3d 363, 368 (Tex. App.–San Antonio 2008, no pet.).

[40] *In re J.G.*, 301 S.W.3d 376, 380-83 (Tex. App.–Dallas 2009, no pet.); *In re S.J.O.B.G.*, 292 S.W.3d 764, 777 (Tex. App.–Beaumont 2009, no pet.); *In re Vernor*, 94 S.W.3d 201, 208-09 (Tex. App.–Austin 2002, no pet.); *Flores v. Contreras*, 981 S.W.2d 246, 249-50 (Tex. App.–San Antonio 1998, pet. denied).

[41] *In re Lewin*, 149 S.W.3d 727, 735-36 (Tex. App.–Austin 2004, no pet.).

[42] *Livanos*, 333 S.W.3d 868, 876.

[43] *In re J.J.L.-P.*, 256 S.W.3d 363, 368 (Tex. App.–San Antonio 2008, no pet.).

[44] *Velez v. Mitsak*, 89 S.W.3d 73, 81-82 (Tex. App.–El Paso 2002, no pet.).

[45] *Va. Indon. Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 906 (Tex. 1995).

[46] 910 S.W.2d at 913-14.

[47] 910 S.W.2d at 914.

[48] 910 S.W.2d at 913.

ii. International human rights law and death penalty appeals

In Texas, as well as in other states that utilize the death penalty, capital defendants sometimes contend that the use of the death penalty violates human rights principles articulated in the United Nations Charter, drafted and signed by the United States and 51 other countries in 1945.[49] The Preamble of the U.N. Charter provides that

> [w]e the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . . .[50]

In *Hinojosa v. State*,[51] a 1999 case in the Texas Court of Criminal Appeals, the defendant argued that the death penalty denied him "'the equal treatment which must be afforded all citizens' of the treaty nations," and that "the United States must abolish the death penalty 'in order to insure that peace and security will prevail without provoking the use of armed forces by others for our own violation of the principles set out in the Charter.'"[52] The court rejected this argument, holding that, as an individual, he did "not have standing to bring suit based on an international treaty when sovereign nations are not involved in the dispute."[53] The court explained that "these treaties operate as contracts among nations. Therefore, it is the offended nation, not an individual, that must seek redress for a violation of sovereign interests. . . . Moreover, the Charter's terms do not mandate abolition of the death penalty. In fact, the Charter specifically prohibits the United Nations from interfering in a country's mechanism for enforcing laws or punishments."[54] Since *Hinojosa*, additional appeals to the United Nations Charter and to the Eighth Amendment prohibition against cruel and unusual punishment in death penalty cases have been summarily dismissed.[55]

The U.N. Charter, however, is not the only means by which a capital defendant might make

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[49] *See* Charter of the United Nations, at http://www.un.org/en/documents/charter/index.shtml.

[50] U.N. Charter, Preamble; *see also Hinojosa v. State*, 4 S.W.3d 240, 251 (Tex. Crim. App. 1999).

[51] 4 S.W.3d 240, 251 (Tex. Crim. App. 1999).

[52] 4 S.W.3d at 251.

[53] 4 S.W.3d at 251.

[54] 4 S.W.3d at 252 (footnote omitted).

[55] *See Norman v. State*, No. AP-76,063, 2011 Tex. Crim. App. Unpub. LEXIS 126 (Tex. Crim. App. Feb. 16, 2011).

a case against the death penalty based on international human rights law. The Universal Declaration of Human Rights, signed by the U.S. in 1948, implicitly contemplates eventual abolition of the death penalty.[56] Other potential sources of international law include the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the American Declaration on the Rights and Duties of Man, and the American Convention on Human Rights.[57] Perhaps because of the unlikelihood that a Texas court would stay an execution based on international human rights, few capital defendants in Texas have raised these arguments.

iii. Foreign law and choice of forum

Likely the most common form of foreign law citation in Texas courts occurs when the court must consider the appropriate law to apply when parties or events occur outside the state. The Texas Civil Practices and Remedies Code provides multiple instances in which some understanding of foreign law is necessary to render a decision. These include recognition of foreign judgments,[58] service of process in foreign jurisdictions,[59] permitting an action for damages in the death or personal injury of U.S. or foreign citizens in U.S. courts,[60] and for the purpose of determining the most convenient forum (i.e., the doctrine of *forum non conveniens*).[61] The Texas Rules of Evidence also provide a means by which parties may introduce proof of applicable foreign law to the court, upon

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[56] *See* Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. Tex. L. Rev. 1115, 1122 (2002).

[57] *See* Bishop, 43 S. Tex. L. Rev. At 1123.

[58] TEX. CIV. PRAC. & REM. CODE § 16.066(a) ("An action on a foreign judgment is barred in this state if the action is barred under the laws of the jurisdiction where rendered."); TEX. CIV. PRAC. & REM. CODE § 35.003(c) ("A filed foreign judgment has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing, or satisfying a judgment as a judgment of the court in which it is filed.").

[59] TEX. CIV. PRAC. & REM. CODE § 17.044(c) ("If an administrator, executor, or personal representative for the estate of the deceased nonresident is not appointed, the secretary of state is an agent for service of process on an heir, as determined by the law of the foreign jurisdiction, of the deceased nonresident.").

[60] TEX. CIV. PRAC. & REM. CODE § 71.031(a)(1) ("An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if . . . a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury . . . .").

[61] TEX. CIV. PRAC. & REM. CODE § 71.051.

which "[t]he court, and not a jury, shall determine the laws of [the] foreign countr[y]."[62]

Accordingly, reference to foreign law in such situations have a long history in Texas. In 1855, in *Trevino v. Fernandez*,[63] the Texas Supreme Court relied on both English precedent and a treatise by the Chief Justice of the Mexican Supreme Court to determine the validity of a Mexican judicial decree that vested title in certain land within the borders of the Republic of Texas.[64] In more recent years, Texas courts have relied on the Third Restatement of Foreign Relations Law,[65] the Second Restatement of Conflict of Laws,[66] the Act of State doctrine,[67] and various foreign law provisions in order to resolve issues that require procedural determinations regarding choice of forum.

The Texas Supreme Court has stated, for example, that "when the laws of the foreign sovereign protect relevant information from discovery, the interests of the domestic court or agency must be balanced with those of the foreign sovereign."[68] In this vein, the Houston Court of Appeals has cited provisions from the Turkmenistan Civil Code to determine its "content and predictability" to a tort claim action;[69] the El Paso Court of Appeals has reviewed Mexican laws on interest since "interest rate is governed by the place where the contract is made";[70] and the Texas Supreme Court

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[62] TEX. R. EVID. 203; *see also Phillips v. United Heritage Corp*., 319 S.W.3d 156, 163-64 (Tex. App.–Waco 2010, no pet.) ("Rule 203 is a 'hybrid rule' by which the presentation of foreign law to the court resembles the presentment of evidence, although the determination of its application is ultimately a question of law. Nevertheless, a party who intends to rely on the laws of a foreign country under Rule 203 must provide to all parties (1) some form of notice and (2) copies of any writings or other sources that the proponent will utilize as proof of such foreign laws." (citation omitted)).

[63] 13 Tex. 630, 666 (1855).

[64] *See* Phillips, 38 TEX. INT'L L.J. at 560.

[65] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c); *Volkswagen v. Valdez*, 909 S.W.2d 900, 902 (Tex. 1995).

[66] RESTATEMENT (SECOND) CONFLICT OF LAWS § 156; *Bridas Corp. v. Unocal Corp*., 16 S.W.3d 893, 897 (Tex. App.–Houston [14th Dist.] 2000, pet. denied).

[67] *United Mexican States v. Ashley*, 556 S.W.2d 784, 786 (Tex. 1977) ("Generally the act of state doctrine provides that courts will not review the validity of executive or legislative acts of a foreign sovereign affecting property within that sovereign's own borders.").

[68] *Volkswagen v. Valdez*, 909 S.W.2d 900, 902 (Tex. 1995).

[69] *Bridas*, 16 S.W.3d at 901.

[70] *Apodaca v. Banco Longoria S. A*., 451 S.W.2d 945, 947-48 (Tex. Civ. App.–El Paso 1970, writ ref'd n.r.e.).

has cited German privacy law to determine whether it conflicts with U.S. discovery requirements.[71] And then, of course, the laws of other states are also included within "foreign laws" when making determinations as to choice of forum and applicable law.[72]

III. Legislation Banning Court Reliance on Foreign and International Law

The fact that citation to foreign and international law is, in many instances, required by law is something that legislators often ignore. The past few years have seen a number of state statutes and congressional resolutions banning the use of foreign or international law in any capacity in judicial decisions.[73] Such legislation is, generally, contrary to state and federal law, as in the aforementioned instances where courts are required to look to foreign and international law in order to render a decision. As one professor remarked,

> The proposed resolutions and legislation introduced in Congress show what these opponents [of foreign law citations] mean by citation of foreign law. Resolutions introduced on November 18 and 21, 2003, instructed the Supreme Court not to "consider" or "look for guidance" to any foreign laws or opinions, new or old, in any of the Court's decisions on any matter whatsoever. These resolutions were not confined to constitutional law. They would have condemned evenhandedly the consideration of foreign law in conflict of laws situations, citation of foreign interpretation of U.S. treaties, and execution of foreign judgments. Compliance with the plain meaning of this language would have left our highest court in violation of some important international treaties.[74]

Moreover, such legislation may very well violate the Separation of Powers doctrine, the First Amendment, and other constitutional principles.

In one of the most widely publicized instances of an anti-international law measure, Oklahoma passed a constitutional amendment, with 70 percent of the vote, which provided that "[t]he courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts

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[71] *Valdez*, 909 S.W.2d at 902.

[72] *See, e.g.*, *Larchmont Farms v. Parra*, 941 S.W.2d 93 (Tex. 1997) (examining the "foreign laws" of New Jersey).

[73] *See generally* David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417 (2006); Martha F. Davis & Johanna Kalb, *Issue Brief: Oklahoma State Question 755 and An Analysis of Anti-International Law Initiatives*, AMERICAN CONSTITUTION SOCIETY (Jan. 2011), http://www.acslaw.org/sites/default/files/davis_and_kalb_anti-international_law.pdf.

[74] Seipp, 86 B.U. L. REV. at 1422 (footnotes omitted).

shall not consider international or Sharia Law."[75] Shortly thereafter, the Western District Court of Oklahoma issued a preliminary injunction against the amendment, finding a substantial likelihood that it violated the Establishment Clause and the Free Exercise Clause of the First Amendment:

> [T]he Court finds that plaintiff has shown that he will suffer an injury in fact, specifically, an invasion of his First Amendment rights which is concrete, particularized and imminent. First, plaintiff claims that the moment the Oklahoma Constitution is amended, his First Amendment rights will be violated by Oklahoma's official condemnation of his religion/faith as reflected through the amendment's ban of the state courts' use or consideration of Sharia Law and that said official condemnation will result in a stigma attaching to his person, relegating him to an ineffectual position within the political community, and causing him injury.[76]

Commentators have attributed this wave of proposed legislation to "a perceived need to defend Christian values, concern about state/federal sovereignty, fear of judicial activism, and belief in American exceptionalism."[77] Less generous observers have described it as "a well-funded campaign of hate, bigotry and xenophobia."[78]

Overall, most of the legislation aimed at banning citation to international and foreign law has been unsuccessful. This has not prevented state legislators from continuing to introduce such measures, despite their frequent inconsistency with state and federal law.[79] While many attribute the introduction of this kind of legislation to Justice Scalia's impassioned dissents in such cases as *Lawrence v. Texas*[80] and *Roper v. Simmons*,[81] Justice Scalia himself has disapproved of such legislation. In a speech to a National Italian American Foundation attended by several House members, the Justice stated that "[n]o one is more opposed to the use of foreign law than I am, but

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[75] *See* Davis & Kalb, at http://www.acslaw.org/sites/default/files/davis_and_kalb_anti-international_law.pdf.

[76] *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1303 (W.D. Okla. 2010).

[77] *See* Davis & Kalb, at http://www.acslaw.org/sites/default/files/davis_and_kalb_anti-international_law.pdf.

[78] James C. McKinley, jr., *Judge Blocks Oklahoma Ban on Using Sharia Law in Court*, NEW YORK TIMES (November 29, 2010) (quoting Imad Enchassi, the imam at the Islamic Society of Greater Oklahoma City), https://www.nytimes.com/2010/11/30/us/30oklahoma.html.

[79] *See, e.g.*, John Wright, *Texas Legislator Seeks to Ban Sharia Law*, DALLAS VOICE (Jan. 11, 2011), www.dallasvoice.com/texas-legislator-seeks-ban-sharia-law-1060234.html.

[80] 539 U.S. 558 (2003).

[81] 543 U.S. 551 (2005).

I'm darned if I think it's up to Congress to direct the court how to make its decisions."[82]

IV. Conclusion: *whither state courts go, the law goest?*

Legal academia and the bench seem to lean toward the transnationalist side of the debate - or at least this faction has been more vocally endorsed in publications and judicial speeches. U.S. Supreme Court Justices Kennedy, Breyer, Ginsburg, and O'Connor have each publicly supported the citation of foreign and international law in courts. As Justice O'Connor has emphasized, "[u]nderstanding international law is no longer just a legal specialty; it is a duty."[83] Former Chief Justice Rehnquist is also among this group, stating, "[n]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."[84]

State court jurists have also widely endorsed this approach, though the use of international and foreign law in their decision-making remains minimal. Over a decade ago, Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court warned that "as the world continues to become smaller as technological capabilities grow, the provincial attitudes of American courts are becoming less excusable."[85] Chief Justice Abrahamson suggests that "foreign opinions could function like superstar amicus briefs, offering otherwise unavailable viewpoints, delivered from unique perspectives, by some of the world's leading legal minds,"[86] or, "[a]t the very least, we American judges should write our decisions with a conscious awareness that decisions from abroad, if considered might complicate and challenge our analyses."[87]

More recently, in 2003, Chief Justice Thomas Phillips of the Texas Supreme Court posited that "state courts remain vital partners in the interpretation and application of both formal and customary international law."[88] Surveying a long history of state court interpretation of international

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[82] Charles Lane, *Scalia Tells Congress To Mind Its Own Business*, WASH. POST (May 19, 2006) http://www.washingtonpost.com/wp-dyn/content/article/2006/05/18/AR2006051801961.html.

[83] See Margaret H. Marshall, *"Wise Parents do not Hesitate to Learn from their Children": Interpreting State Constitutions in an age of Global Jurisprudence*, 79 N.Y.U.L. REV. 1633, 1638 n.24 (2004).

[84] William H. Rehnquist, *Constitutional Courts - Comparative Remarks, in Germany and Its Basic Law: Past, Present and Future - A German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993), *quoted in* Marshall, 79 N.Y.U.L. REV. at 1638 n.24.

[85] Shirley S. Abrahamson, Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millenium*, 26 HOFSTRA L. REV. 273, 291 (1997).

[86] Abrahamson, Fischer, 26 HOFSTRA L. REV. at 287.

[87] Abrahamson, Fischer, 26 HOFSTRA L. REV. at 284-85.

[88] Phillips, 38 TEX. INT'L L.J. at 558.

law, with a particular emphasis on Texas, Chief Justice Phillips concluded that "[i]f the courts do retain their primacy [over non-traditional judicial fora] . . . state courts in our country are ready and able to continue their historical federalist role in interpreting and applying international law."[89]

In 2004, Chief Justice of the Massachusetts Supreme Court, Margaret H. Marshall, echoed the sentiments of Chief Justices Abrahamson and Phillips, offering this insight on the potential role of foreign law citations in state court opinions:

> [I]n many ways, state judges are uniquely positioned to take advantage of the significant potential of comparative constitutional law. First, our federal system has . . . "made seasoned comparatists of all of us." As a state court judge, I have frequent occasion to look to the constitutional law of fifty other American jurisdictions, even though other states' interpretations of their constitutions have no precedential weight for Massachusetts. They do, however, provide guidance, perspective, inspiration, reassurance, or cautionary tales. How odd, then, when one stops to think of it: A novel issue of constitutional law will send us, our clerks, and counsel to the library to uncover any possible United States source of authority - including the note of a second-year law student. But in our search for a useful legal framework, we ignore the opinion of a prominent constitutional jurist abroad that may be directly on point.[90]

Indeed, state court caseloads make up over 95% of all cases decided in this country,[91] and as Chief Justice Marshall points out, state courts "are the arenas in which most American litigation concerning fundamental human rights and freedoms takes place."[92] This fact has not gone unnoticed by practitioners. One California practitioner suggested that "California courts are agents of the developing legal order," and that "[a]ll courts, including state courts are competent to interpret international human rights law and each state court proceeding in which human rights law is used, even as an interpretive device, contributes to the growth and strengthening of human rights norms."[93]

International human rights law, in particular, is of increasing prominence in this legal debate— most notably in the fields of capital punishment, gay rights, and certain privacy rights. The fact that these areas are already highly politicized complicates, and often obfuscates, the question concerning the propriety of the use of international and foreign law in American courts. Whether the fear of referencing such law stems from xenophobia or a perceived devotion to our own Constitution, judges and practitioners should remember that "[i]t does not lessen our fidelity to the Constitution

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[89] Phillips, 38 TEX. INT'L L.J. at 565..

[90] Marshall, 79 N.Y.U.L. REV. at 1641-42 (footnote omitted).

[91] Marshall, 79 N.Y.U.L. REV. at 1641 n.35.

[92] Marshall, 79 N.Y.U.L. REV. at 1644-45.

[93] Paul L. Hoffman, *The Application of International Human Rights Law in State Courts: A View From California*, 18 INT'L LAW. 61 (1984).

or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[94]

The role of state courts in recognizing the utility of foreign and international law remains unseen. An open acknowledgment of the historical utility of such laws within state court jurisprudence (like that provided by Chief Justices Abrahamson, Phillips, and Marshall) may provide a shift in the discussion, away from highly politicized federal cases to the myriad, everyday instances in which courts use the laws of other countries, and of international treaties, to most fairly and effectively carry out justice.

[94] Brand, 45 DUQ. L. REV. at 429-30.